

No. 19438

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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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SOUTHERN PACIFIC COMPANY,  
a corporation; et al.,

*Appellants,*

v.

SWITCHMEN'S UNION OF NORTH AMERICA,  
AFL-CIO, a voluntary association; et al.,

*Appellees.*

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*On Appeal from Summary Judgment of the United  
States District Court for the Northern District  
of California, Southern Division*

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**MEMORANDUM OF APPELLEES ON REHEARING**

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**MEMORANDUM OF APPELLEES ON REHEARING**

In its order granting a rehearing this Court requested the parties to answer three questions for the purpose of furnishing the Court "enlightenment on the question of the degree to which existing collective bargaining agreements restrict the freedom of the railroad to assign personnel to yard work or road work and the freedom of employees, by themselves or through their union, to secure such work."

## QUESTION 1

The first question posed by the Court is as follows:

“1. Could an employee whose past employment has been in the area of road work and who is a member of BRT be assigned by the railroad to switching duties in a closed yard or secure such employment? Conversely, could a member of SUNA secure employment in the performance of switching work at the City of Industry or be assigned to such duties by the railroad?”

The answer to the foregoing two questions is for all practical purposes “No,” but with exceptions which point up the type of relationship which holds both employees and railroad to observance of employment relationships along craft lines. In the first place, it should be pointed out that membership of an employee in either the BRT or SUNA has nothing whatsoever to do with whether an employee is qualified to be assigned to road or yard work. As the record here shows, prior to November 1951 the BRT represented yard service employees on the Southern Pacific (Tr. 40), at which time a minority of the yard service employees were members of SUNA. Since 1951 the SUNA has been the representative of yard service employees on Southern Pacific, but a minority of yard service employees continue to be members of BRT. Under the provisions of Section 2, Eleventh (c) of the Railway Labor Act (45 USC 152, Eleventh) membership in either BRT or SUNA satisfies the union shop provisions of either the SUNA or BRT union shop contracts.

The seniority arrangements of both BRT and SUNA, however, serve to bar the railroad from assigning yard service employees to road service or vice versa except in limited and unusual situations which we will describe hereinafter. The seniority arrangements of both BRT and SUNA with the Southern Pacific are traditional in form. Road service employees have seniority only for road service; yard service employees have seniority only for yard service. So if Southern Pacific desired to assign a road service employee to yard service or vice versa, it could do so only if no one holding seniority in the particular craft or class was available for the job and if the assignee entered as a new employee at the bottom of the seniority roster.

The exceptions to the foregoing are that in an emergency road service employees may be used for yard service and vice versa and, in instances where the extra board is exhausted in either road service or yard service, a crossing over to remedy the lack of men on the extra board is permitted. Except in these two unusual situations the railroad is confined by seniority agreements to using employees holding seniority as yardmen for assignments in yard service and to using employees holding seniority on roads for assignments in road service.

One other situation gives the appearance of an exception but on analysis it proves not to be an exception. If switching service in any yard becomes so reduced in amount as to use only one engine on a shift, and that for less than four hours per shift, the employer may use road employees to perform such switching. In effect this

involves abolition of the yard for such period as switching remains at or below the set figure and to merge the limited switching there performed into road service.

Except for the foregoing unusual situations the Southern Pacific cannot assign an employee whose past employment has been in the area of road work to switching duties where yardmen are employed and such an employee could not secure such employment unless he signed onto switching work as a new employee with his name at the bottom of the yard service seniority roster. Conversely, an employee with yard seniority could not presently secure employment in the performance of switching work at the City of Industry or be assigned to such duties by the railroad unless no employee with road seniority made a claim to the work and the yard service employee was willing to sign on for switching work at the City of Industry as a new employee with his name at the bottom of the road seniority roster.

## QUESTION 2

The second question posed by the Court is as follows:

“2. If the answer to the foregoing is in the negative (or, if in the affirmative, only subject to loss of substantial rights), could the unions bargain for the right of their members to free employment in pursuit of their craft, whether within or without closed yards?”

It is the position of SUNA that it is entitled to bargain for the right of the employees whom it represents, that is all employees of Southern Pacific in the craft or



class of yardmen (foremen, helpers, switchtenders), to perform the functions of their craft wherever Southern Pacific has such work to be done. Again, we respectfully point out that unions cannot bargain for their members except when their members are within the craft or class for which the union is certified. SUNA is certified for all yard employees of Southern Pacific whether members of SUNA or not. BRT has members within this craft or class but cannot bargain for them because it is not the certified representative of this craft or class.

In the instant case SUNA invoked the procedures available to it under Section 6 of the Railway Labor Act for the purpose of preserving to the employees it represents yard work formerly done by them but which had been or was being transferred away from them. The complaint herein had attached as Exhibit "A" (R. 14-15) the Section 6 notice served by SUNA on the railroad on February 6, 1961, by which SUNA sought to secure employment for employees it represented, to secure to them the right "to all work in the nature of switching and allied service to be performed in the general area at a place and yard" known as "City of Industry, Future Yard Development." The complaint set forth the details with respect to the transfer of work performed by employees represented by SUNA from the railroad's switching yard in Los Angeles to City of Industry, where instead of being done by yard service employees the railroad assigned the switching work to road service crews whose rate of pay is lower than the yard rates of pay (R. 7-8). The National Mediation Board accepted and processed this as a proper Section 6 notice (R. 4-5, 8, 16-18). The court below likewise held this was a

proper Section 6 notice dealing with a subject about which it was proper for SUNA to bargain with Southern Pacific (R. 171, 173).

This Court in its initial decision of this case took the view that SUNA should have resorted to the National Mediation Board for a determination of its right to represent employees doing switching at Oakland, in the vicinity of Salem and at City of Industry. In so ruling this Court misconceived SUNA's position. SUNA wants employees it already represents to be allowed to perform the usual functions of their craft or class at City of Industry and the other locations involved. It is not seeking to have employees already represented by BRT change their representation. SUNA has been certified to represent all yard service employees of Southern Pacific. The work being performed at City of Industry and the other pertinent locations is in fact yard work. However, presumably because road switching rates of pay are lower than yard switching rates of pay (R. 7-8), the railroad has assigned road service employees to perform the switching work at Oakland, in the Salem vicinity, and at City of Industry and has not designated these areas as yards. SUNA has therefore sought by its Section 6 notices to have Southern Pacific recognize the yard status of the switching service actually being performed at these three locations.

The National Mediation Board regularly requires unions to utilize Section 6 procedures for delineating the dividing lines between road and yard work. Although the National Mediation Board treats yard service as a distinct craft or class, it depends upon bargaining to establish what is to be included in a yard area. The Na-

tional Mediation Board holds that all employees working a majority of their hours in a "yard" are "yardmen." The craft or class of yardmen includes employees working in "open" yards as well as "closed" yards. An attempt to limit the class or craft to "closed" yards has been rejected by the National Mediation Board as an improper effort to split a true craft or class. *Spokane, Portland & Seattle Railway Company*, 3 N.M.B. 159, 163-167 (Cases Nos. 3-2753, 2763, 2805). There the National Mediation Board stated:

"The ORC contention was primarily that the men doing yard work in the open yards are roadmen, because they hold seniority only as roadmen and there is no yard seniority as such for the men working in those yards.

"Yard service has been recognized for a great many years in the majority of rail carriers as a separate occupational classification and has on many occasions in the past been held by this Board to constitute a separate craft or class for representation purposes under the Railway Labor Act. The differences in the duties of road trainmen and men in yard service was fully described in the *Classification and Index of Steam Railroad Occupations*, issued by the United States Railroad Labor Board in 1921. These four occupational classifications and their descriptions are as follows:

*'Yard Conductor or Yard Foreman:*

"\* \* \* positions in which the duties of incumbents are to supervise and assist the work of switchmen and helpers in yard switching and yard work train service, including supervision of the breaking up and making up of trains; and to perform related work (p. 257).

*'Yard Brakeman or Yard Helper, Switch-tender:*

"\* \* \* positions in which the duties of incumbents are to couple, uncouple and ride cars in connection with the breaking up and making up of trains; to handle switches; and to perform related work in connection with yard switching or switch tending service (p. 208).

*'Road Freight Brakeman or Flagman:*

"\* \* \* positions in which the duties of incumbents are to assist conductors in the operation and protection of freight trains; and to perform related work (p. 257).

*'Road Freight Conductors:*

"\* \* \* positions in which the duties of incumbents are to have charge of the operation of freight trains en route and at stations, between terminals; and to perform related work (p. 256).'

\* \* \* \* \*

"It is clear to the Board that the commonly accepted distinction between road and yard service prevails on the Spokane, Portland & Seattle Railway and its operated subsidiaries; further, that the crews regularly assigned to yard switching work at the seven locations now referred to as 'open' yards are in fact and in name also yardmen;\* \* \*"

That a Section 6 notice is the only avenue by which SUNA can preserve to its constituency the right to follow their switching work when it is transferred to points such as City of Industry, which are not within "closed yards,"

is made clear by the decision of the National Mediation Board in *Chicago & Northwestern Railway Co.—Yardmen and Switchtenders*, 1 N..M.B. 130, 135, 137 (Case No. R-218). There the BRT, being already the certified representative of all yard employees, sought to have the National Mediation Board exclude employees represented by the ORC from doing yard work. The National Mediation Board dismissed, suggesting bargaining with the carrier as the proper solution. The Board stated:

“We have here no dispute such as is described in Section 2, Ninth, of the Railway Labor Act.

“The dispute that does exist here is of a different character. It involves the right of employees of one craft or class to do the work that is commonly done by employees of another craft or class. By agreements whose validity is not questioned, road conductors are authorized to do yard work in the Chicago switching district. The Brotherhood of Railroad Trainmen desires to change this agreement, but the Order of Railway Conductors objects, and the carrier will not agree to make the change because the conductors refuse to relinquish their contractual right to work as yard foremen. Failing in its efforts to secure a modification of the agreements, the Brotherhood requests a finding by this Board that the men doing yard foremen’s work in the Chicago switching district do not belong in the craft or class of road conductors but in the craft or class of yardmen and switchtenders. \* \* \*

“We are of the opinioin that the Railway Labor Act does not authorize the Board to decide a dispute of this character under the authority of Section 2, Ninth. It is our view that the dispute involves either

a change in the existing agreements or interpretation of the agreements,\* \* \*

“If, on the other hand, the Brotherhood is correct in its contention that the road conductors working in the Chicago yards are in fact yardmen of the craft or class of yardmen and switchtenders, then it is already the legal representative of these men under the authority of Section 2, Fourth, of the Railway Labor Act; for it is admitted by all concerned that a majority of the yardmen and switchtenders have designated the Brotherhood as the authorized representative of the craft or class. But the determination of such a legal right as against the contractual right of the conductors is a matter for the courts and beyond the jurisdiction of this Board.\* \* \*

\* \* \* \* \*

“The right of these conductors to work as yard foremen in the Chicago yards was established by agreements of the Brotherhood with the Order of Railway Conductors and the railway company. \* \* \* If any reclassification is to be made either of the roadmen or the road work, it is our view that it will have to be done by changing the existing agreements \* \* \*.”

In view of the foregoing decisions, it seems clear that SUNA has no remedy before the National Mediation Board. Instead, SUNA has only the recourse to the Section 6 procedures for changing of agreements, the course which SUNA has followed and which the court below held proper.



### QUESTION 3

The third question which this Court put to the parties is as follows:

“What is the significance of paragraph (b) of Article 10 of the SUNA-SP agreement (pages 63-64 of the printed copy) in the light of the present dispute? Could SP, subject to the specified procedures, extend switching limits by designating City of Industry as a closed yard? If so, can SUNA bargain for such an extension?”

SUNA has no doubt that under paragraph (b) of Article 10 of the SUNA-SP agreement (pages 63-64 of the printed copy) the switching limits of the Los Angeles yard could be extended to include City of Industry within one and the same yard as includes Los Angeles. Similarly, the switching limits at Salem, Oregon yard and at Oakland, California yard would be extended to include the locations where local freight crews are now performing the switching service. While by its terms, paragraph (b) of Article 10, provides a procedure to be used where the carrier desires to extend switching limits, it does not bar SUNA from bargaining for such a change. The chief significance of paragraph (b) of Article 10 is that identical provisions appear in the contracts between Southern Pacific and BRT (page 103 of the printed copy) and ORC (page 95 of reprint of 1957, inserted in the bound copy). Since this provision provides for arbitration, Southern Pacific has a ready means of adjusting the whole dispute by arbitration and without any risk of a strike. See testi-

mony of Corcoran, General Chairman on the BRT, agreeing that this provision afforded the solution of arbitration for the dispute here involved (Tr. 49).

### THE NMB CERTIFICATIONS

We believe the representation certifications are matters of which this Court can properly take judicial notice. Copies of the certification of SUNA by the National Mediation Board in 1958 and 1964 are printed as Appendices to the Petition of Appellees for Rehearing. No one has challenged the accuracy of these copies. If, however, this Court should decide it cannot properly notice these certifications, in that event we ask the Court to grant us leave to supplement the record by adding as exhibits certified copies of the certifications.

### CONCLUSION

We respectfully urge this Court to consider our petition for rehearing and response, together with our main brief, along with this memorandum. We have not reprinted in this memorandum the arguments set forth in the three aforementioned documents. All four documents should be considered together to get a full statement of appellees' position.

We believe the court below properly held that the Section 6 notices served by SUNA presented a bargainable issue. SUNA as the representative of yard service employees owed them the duty to bargain with Southern



Pacific to preserve their jobs when yard work they were doing was transferred a few miles away and given to other employees. The judgment below should be affirmed.

Respectfully submitted,

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December 28, 1965

#### **CERTIFICATE OF COUNSEL**

I, Clifford D. O'Brien, one of the Attorneys for Appellees, hereby certify that in connection with the preparation of this Memorandum I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Memorandum is in full compliance with those rules.

CLIFFORD D. O'BRIEN

